IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2001/S-008

BETWEEN	HERMAN SAMUELS	PLAINTIFF
A N D	GORDON STEWART	1st DEFENDANT
A N D	ANDREW K. REID	2ND DEFENDANT
A N D	BAY ROC LIMITED	3rd DFENDANT

Leonard Green for Plaintiff, instructed by Chen Green & Co.

Dave Garcia and Nigel Jones for Defendants, instructed by Myers Fletcher & Gordon.

Heard: 8th January 2003 and 31st January 2003

McDONALD J. (Ag)

This application seeks an order to set aside interlocutory judgment in default of defence and for leave to file defence.

During the course of the hearing the Defendants withdrew application for an order that the Plaintiffs Attorney-at-Law produce to the court within 14 days their written authority to sue on behalf of the Plaintiff.

The claim is one to recover damages for negligence:

> "For that on or around the 12th day of November, 1999 while the plaintiff lawfully swam in the Caribbean Sea adjacent to

the private property known as Sandals Montego Bay in the parish of St James – the second named Defendant, the servant and or agent of the First and or Third named Defendants, while operating a ski-boat owned by the first and or Third named Defendants under the name or style of Sandals Montego Bay, negligently cause same to collide with the Plaintiff as a result of which collision the Plaintiff sustained severe personal injury, was hospitalized extensively, suffered damages and was put to great inconvenience and loss.

The First and or Third Defendants are sued as the principals of the Second named Defendant which said First and or Third named Defendants carry on business under the name or style of Sandals Montego Bay the employer of the Second Defendant ski-boat operator".

It is to be noted that paragraph 4 of the amended Statement of Claim refers to the accident as occurring "on or around the 13th day of November 2002".

Chronology of events

1. On 24th May 2001 writ of summons was filed and on 11th July, 2001 Statement of Claim was filed.

2. On the 19th April, 2002, the plaintiff filed an amended endorsement to the Writ of Summons and amended Statement of Claim.

3. Appearance was entered on the 10th May, 2002 on behalf of all Defendants by Myers Fletcher & Gordon.

4. On 25th July, 2002 interlocutory judgment in default of defence was filed and entered.

5. On 11th September, 2002 a copy of interlocutory judgment and summons to proceed to assessment of damages were received by Myers Fletcher & Gordon.

6. On 10th November, 2002 summons to proceed to assessment of damages was set for hearing, but adjourned sine die as summons to set aside judgment was pending, having been filed on 2nd October, 2002.

7. On 8th January, 2002 summons to set aside judgment and summons to proceed to assessment was set down for hearing.

In support of summons to set aside the interlocutory judgment two affidavits were filed, one by Dmitri Singh In-House Counsel for the 3rd Defendant and the other entities which form a part of Sandals Resorts International; and the other by Horace Peterkin, general manager of Sandals Montego Bay which is managed by the 3rd Defendant Bay Roc Ltd.

Paragraph 9 – 11 inclusive of Mr. Singh's affidavit set out the defence as well as paragraph 6 and 8 of Mr. Peterkin's affidavit. A proposed defence has been exhibited to the affidavits.

There is no contest that the judgment was not regularly entered.

Both Counsel agreed that section 258 of the Judicature Civil Procedure Code Law was applicable. Further that the Civil Procedure Rules 2002 treat this proceedings as "old proceedings" to which the new rules would not apply.

Mr. Green at the commencement of his submissions stated that in light of the matters raised in both the affidavits of Mr. Singh and Mr. Peterkin in respect of the 1st Defendant there would be a triable issue arising on the facts before the court. He submitted that in respect of the 2nd and 3rd Defendants there were no triable issues.

On this basis it would appear that he was not contesting the summons as far as the 1st Defendant was concerned. However as his arguments developed the standard enunciated by him to be met by a defendant who is seeking leave to defend was not whether the defence disclosed a triable issue but whether it had "a real prospect of success".

Defendant's Case:

Mr. Garcia submitted that the affidavit evidence shows that there is a triable or arguable defence on the basis that the Defendant was not negligent and that there was accord and satisfaction.

He referred the court to paragraphs 9, 10 and 11 of Mr. Singh's affidavit. Paragraph 9 reads as follows:

> "The Plaintiff's claim arises from a collision at sea between the Plaintiff and a ski boat which was at the material time being operated by the 2nd Defendant. I am informed by Mr. Horace Peterkin and do verily believe, that the said collision occurred in November 2000, and at a time when the Plaintiff was diving, and was therefore below the surface of the water in an area regularly used by boats. I am further informed by Mr. Peterkin, and do verily believe, that on occasions prior to the collision, the Plaintiffs had been warned by employees of the 3rd Defendant (a) that he ought not to dive in that area and (b) that it was also unwise to conduct diving, which would have the Plaintiff under the waters surface and not visible by the operators of vessels, without the use of a device that would float on the surface of the water alerting boat operators and other persons to his presence".

In respect to paragraph 9, Mr. Garcia submitted that there was evidence of negligence or contributory negligence on the part of the plaintiff which caused the collision in question.

Mr. Garcia submitted that paragraph 10 of the affidavit gives evidence of a defence along the lines of accord and satisfaction.

Paragraph 10 reads:

> "I am also advised by Mr. Peterkin, and do verily believe, that following discussions between Mr. Peterkin and the Plaintiff, the 3rd Defendant paid various expenses (including medical expenses) of the Plaintiff, and on or about August 8, 2001, 3rd Defendant paid to the Plaintiff the additional sum of $380,000 (and gave to him a celluar telephone) in the full and final settlement of his claim. I exhibit hereto marked 'DS4' a copy of the remittance advice, dated August 8, 2001, in respect of the amount of $380,000 so paid. The said amounts were paid to the Plaintiff in consideration of his unconditionally releasing the 3rd Defendant, its associates, agents and employees, which would include the 2nd Defendant; the 1st Defendant and his associates and agents from any and all liability, now or in the future, with respect to the said collision. Evidencing the said release of the Defendants, the Plaintiff on or about August 9, 2001, executed a Release, a copy of which is exhibited hereto marked DS5".

Paragraph 11 reads:

> "The property upon which the Sandals Montego Bay Hotel is located is not owned by the 1st Defendant and was not owned by him at the time of the collision. The property is owned by the Commissioner of Lands, and the hotel situated on the property is managed by the 3rd Defendant. The ski boat, which the 2nd Defendant had been operating at the time of the said collision, was owned by the 3rd Defendant, and was never owned by the 1st Defendant."

Mr. Garcia stated that in these circumstances the 1st Defendant could not be vicariously liable for the alleged acts of the 2nd Defendant.

He submitted that the plaintiffs response by way of Miss Sylvan Edwards affidavit to the defence that the defendants are not negligent was that the defendants had admitted liability.

He stated that none of the exhibits attached to Miss Edwards affidavit nor in the Release itself is there any such admission.

Mr. Garcia submitted that the Release constitutes a complete defence. He referred the court to Clerk and Lindsell on Torts 16th Edition 9-06 which reads:

> "When the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the accord and satisfaction constitute a complete defence to any further proceedings upon that right of action. In general, the right of action is not discharged until the satisfaction is performed and part performance is not sufficient".

He also referred the court to **Bell v. Galynski and Kings Loft Extensions Ltd (1974) Lloyds Law Report Vol. 2 page 13**.

In reference to Miss Edwards affidavit, Mr. Garcia stated that he understood her to be raising undue influence as a basis on which a document such as a Release may be set aside. He submitted that the burden would be on the plaintiff to establish undue influence, and the issue of the validity of the Release in the context of such an allegation would be a triable issue.

Plaintiff's Case

With respect to the court's ability to exercise its discretionary power to set aside default judgments Mr. Green referred the court to Order 13/9/14 of the Supreme Court Practice 1997 and to **Alpine Bulk Transport Co Inc. v. Saudi Eagle Shipping Co. Inc. (The "Saudi Eagle") C A Loyds Law Report 221.**

He referred to "The Saudi Eagle page 223 order 13/9/14 which states:

"From that case the following proportions may be derived:

(a) It is not sufficient to show a merely 'arguable' defence that would justify leave to defend under Order 14: it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action"....

He asked the court to look at the factual situation and referred to the Writ of Summons and Statement of Claim. Of critical importance he said, is the Release exhibited by the defendants describing the payment as "compensation". He submitted that compensation as a matter of common sense must be for the injuries the plaintiff sustained in the boating accident on the 12th November, 1999.

Further that this compensation was never conditional nor was it made by way of ex gratia payment or award. He also pointed out that the Release was undated.

Mr. Green stated that by letter dated 4th January, 2000 Exhibit 'SE1' to the manager of Sandals Montego Bay, Chen Green and Co. stated that they acted for the Plaintiff.

Letter dated 4th August, 2002 to Axis Jamaica Ltd Exhibited "SE 2" also stated that Chen Green and Company act for the Plaintiff in the matter.

Mr. Green reminded the court that the Writ of Summons was filed on 25th April, 2001 and opined that when the plaintiff entered into the Release without their knowledge and advise this amounted to undue influence.

He submitted that there is nothing on the part of the defendants or their representatives at any stage to indicate that they were not liable. The only issue is whether the money paid to the plaintiff can as a matter of law constitute

compensation for injuries sustained by him, and that matter can be tried if the judgment stands, an assessment being a trial.

Mr. Green opined that the defendants cannot be relying on an accord and satisfaction in paragraph 6 of Mr. Singh's affidavit and paragraph 6 (1) at the same time as 6(1) is a denial of liability. He submitted that accord and satisfaction presupposes the acceptance of liability in the absence of words or expressions contained in the proposed release which would support a conclusion that payment was conditional.

He refuted Mr. Garcia's position that the burden of proof is on the plaintiff to establish undue influence instead he asserts that it is on the defendant who seeks to rely on it.

He submitted that the plaintiff relies on the principles of "presumed undue influence" as opposed to "actual undue influence".

He referred the court to **Goff and Jones** on the Law of Restitution 5th edition page 359 which reads:

> "There is a presumption of undue influence if a party who is in a confidential relationship with another confers a benefit on that other. Once the presumption is raised, the onus of proof is on the other party to show that the transferor acted with an independent mind and will, free from any undue influence. If the presumption is not rebutted, the transaction is set aside even though there is no evidence of actual undue influence.
>
> The underlying purpose of the courts of equity, in raising a presumption of undue influence in certain cases, is to prevent victimisation by influence over the mind of another in circumstances where proof of the exercise of such influence may be impossible, and that they do so by requiring proof of the removal of that influence".

In conclusion Mr. Green submitted that in light of the defendants conduct it would be unlikely that they could succeed on the issue of liability at trial, and they would suffer no injustice if the matter is put for assessment.

In reply Mr. Garcia stated that it was the party seeking to set aside the document, i.e. Release who must raise the presumption before any onus may be shifted to the party seeking to rely on the document.

He submitted that two elements must be present if the presumption is to be raised: firstly the Plaintiff must satisfy the court that there was a relationship of trust and confidence between the plaintiff and the defendant. He submitted that Miss Edward's affidavit contains no such evidence. Secondly, the plaintiff must show that he has suffered manifest disadvantage as a result of the transaction. This involves the absence of any benefit to the plaintiff from the transaction and not merely that the plaintiff could have got a better deal. In the instant case, he submits that there is no evidence of manifest disadvantage as the Release executed by the plaintiff clearly sets out benefits which the plaintiff received.

In **Evans v. Bartlam (1937) 2 ALL E.R. 648** it was held that setting aside a default judgment was discretionary and that there are rules to guide the exercise of this discretion. One rule is that where the judgment was regularly obtained there must be an affidavit of merits that is, the affidavit must produce evidence of a prima facie defence.

In addition the court should consider whether or not the defendant is guilty of laches in making his application and whether he has offered an explanation as to why he failed to file a defence.

Lord Wright in Evans v. Bartlam (supra) page 489 said this: "the primary consideration is whether he has merits to which the court should pay heed, if merits are shown the court will not prima facie desire to let a Judgment pass on which there is no proper adjudication".

In examining what a defence on the merits means Lord Denning M R in the case of **Burns v Kondel Lloyd's Law Reports 1971 Vol. I at page 555** said:

> "That does not mean that the Defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue. In an accident case, it is sufficient if he shows that there is a triable issue of contributory negligence. A plea of contributory negligence, if successful may reduce the damages greatly".

In **Book Traders Caribbean Ltd & West Indies Publishing Ltd v. Jeffrey Young SCCA 59/1997** delivered on November 10, 1997, Forte J A (as he then was) at page 10 said:

> "Vann and Anor v. Awford. The Times 23rd April 1986 cited with approval in the Gleaner Co. Ltd and Dudley Stokes v. Eric Anthony Abrahams SCCA 80/80 delivered 11th December, 1991 was relied on. There the default judgment was set aside although lies were told because there were triable issues which is always the overriding consideration".

In Moncure v. Delisser SCCA 31/1997 delivered on July 31, 1997. Rattray P at page 4 said:

> "We are satisfied that once the issue is raised and there is sufficient material disclosed which indicates the existence of a triable issue on the facts, the default judgment should not be allowed to stand".

In **Day v. R A C Motoring Services Ltd C A (1999) 1 ALL E.R. 1007** it was held that:

> "When considering whether to set aside a judgment obtained in default of defence, the court did not need to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had an arguable case which carried some degree of conviction. The Court should, however be very wary of trying issues of fact on affidavit evidence where the facts were apparently credible and were to be set against the facts being advanced by the other side, since choosing between them was the function of the trial judge, not the judge on the interlocutory application unless there was some inherent improbability in what was being asserted, or some extraneous evidence which would contradict it".

I adopt the standard laid down in Moncure v. Delisser (supra) and am mindful of the fact that the English Court of Appeal decisions are of persuasive authority only.

I find that paragraphs 9 – 11 of Mr. Singh's affidavit and paragraphs 6 and 8 of Mr. Peterkin's affidavit disclose triable issues.

The real test is whether or not the defendants have a defence which discloses triable issues. The defence as set out in the affidavit of merit alleges negligence on the part of the Plaintiff or alternatively contributory negligence. The defence of the 1st Defendant as stated in paragraph 11 of Mr. Singh's affidavit seeks to establish that he would not be vicariously liable for the alleged acts of the 2nd Defendant. In so far as the defence of satisfaction and accord has been raised, it would be an issue for the trial court to decide whether or not the

document entered into by the Plaintiff and Defendants is valid or whether the question of undue influence actual or presumed arises.

There is evidence of delay a period of 5 months from the entry of Appearance to the filing of the summons or set aside the default judgment. This delay has been explained in paragraphs 3 – 7 of Mr. Singh's affidavit. I do not find this delay to be inordinate.

In the case of **Ladup Limited v. Siu (unreported)** but referred to by Dillion L J in **Vann and another v. Awford (supra)** Lord Justice May said at page 10 of his judgment:

> "Although in these cases where an application is made to set aside judgment obtained by default, it is frequently said that not merely must a defence on the merit be shown, but also a reasonable explanation for the delay and default, I think that the passages to which I have referred from the speeches in **Evans v. Bartlam,** made it quite clear that it is the first, the defence on the merits, which is of the prime importance, at least in the case of an interlocutory judgment, and that the question of delay is a matter which falls to be dealt with only secondarily".

I respectfully adopt the words of Carey J A in **Monteca Warehouse Limited v. Anthony Chin Qee et al C A No. 45/87** (unreported) when he said:

> "In order that a litigant should be driven from the judgment seat, some very good reason should be shown to allow that to take place. Delay by itself and that has been demonstrated here, is not in my judgment enough".

Order granted in terms of paragraph 1 as amended, 3 and 4 as amended of summons dated 2nd October, 2002.